Legitimate Parents

Construing California's Uniform Parentage Act to Protect Children Born Into Nontraditional Families

No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), . . . courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored.

—*In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998)

In three recent landmark decisions, *Elisa B. v. Superior Court,*[1] *K.M. v. E.G.,*[2] and *Kristine H. v. Lisa R.,*[3] the California Supreme Court concluded that children born into gay and lesbian families must be afforded the same rights and legal protections provided to other children. These cases are monumental in that they represent the first reported decisions to hold that parental rights can be established by parents of the same gender without an adoption and without proof of a biological relationship to the child. The California Supreme Court is the first state high court to reach this issue.[4]

As evidenced by recent increases in the numbers and visibility of alternative families, new reproductive technologies have enabled single parents and gay and lesbian parents to have children.[5] All three cases respond to this reality by providing protection and security to the children born into these families. The decisions affirm that the parentage laws and public policies of California must equally protect the physical, emotional, and financial needs of children who are born into a family consisting of two same-sex parents.

The issues resolved by these cases will affect not only the children of these families but also thousands of other children who have been and, in the future, will be born to same-sex and unmarried heterosexual couples through assisted reproduction. The outcome of all three decisions promises to ensure that the parentage laws in this state will be applied consistently and fairly so that children in all kinds of families can rightfully expect equal treatment.

The article begins by providing the legal background and context for the Supreme Court's historic parentage decisions. For the reader to appreciate the significance of *K.M., Elisa B.,* and *Kristine H.,* it is necessary to understand California's statutory scheme for the establishment of parentage, including the important public policies and case law that contributed to the legal definition of the term *parent* over the 30 years since California adopted the Uniform Parentage Act (UPA) in 1975.[6] The second section examines the evolution of this state's legal framework for deciding parentage in cases involving reproductive

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The purpose of the Uniform Parentage Act (UPA) is to prevent discrimination against children based on the marital status of their parents. In August 2005, the California Supreme Court issued three seminal decisions interpreting the UPA that protect the rights of children born into families with same-sex parents. These cases promise legal protection for many children who are born into and live in nontraditional families. The legal issues resolved in the cases are consistent with recent parentage determinations under California's statutory scheme in cases involving reproductive technologies. This article analyzes the three parentage cases in the context of the history, policies, and purpose of California's parentage laws. In addition, it proposes that these decisions should be used as authority to establish parentage under two additional theories in future cases arising in the context of nontraditional families who procreate through assisted reproduction. ■

technologies and that framework's connection to the formation of nontraditional families.

Next, the article discusses the court's decisions in *K.M., Elisa B.,* and *Kristine H.,* explaining their significance in achieving the statutory objectives and policies of the UPA by affirming that children born into families with same-sex parents shall not be "excluded from the protection of a law intended to benefit all minors, legitimate or illegitimate."[7]

Finally, the article proposes two additional bases for establishing legal parentage in the context of assisted reproduction—Family Code section 7613(a) and the "intent" standard developed by case law.[8] *K.M., Elisa B.,* and *Kristine H.* address and rely on both theories and should be used as authority in establishing parentage in future cases involving unmarried heterosexual parents or same-sex parents who do not otherwise qualify for protection under California law.

THE PURPOSE AND POLICIES OF THE UPA—THE PRESUMPTION OF "LEGITIMACY"

The foundation of California's parentage laws lies in the Uniform Parentage Act. The following briefly discusses its background, enactment, and underlying public policies.

BACKGROUND OF THE UPA

Under the common law, concern for children's interests was deemed less important than the desire to restrict childbearing to the confines of marriage.[9] This resulted in rules that penalized nonmarital children. Most states denied a nonmarital child the right to inherit from his or her father, the right to bear the father's name, and the right to public benefits based on the parental relationship; paternity actions were also subject to very short statutes of limitation and evidentiary restrictions.[10]

Beginning in the late 1960s, the U.S. Supreme Court struck down "nearly all forms of legal discrimination against non-marital children."[11] In its 1972 decision, *Weber v. Aetna Casualty & Surety Co.,* the Court condemned in no uncertain terms the practice of punishing children for the irresponsibility of adults:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.[12]

During that same period, the Court established new rights for unmarried fathers. In *Stanley v. Illinois,*[13] the Court held that an unmarried father was entitled to a hearing on his fitness as a parent before his children could be placed in state custody.[14] The Supreme Court's decisions dramatically shifted the laws of paternity to focus on the constitutional rights of nonmarital children.[15]

ENACTMENT OF THE UPA

The UPA was adopted by the Legislature in 1975 and is now codified in California's Family Code.[16] The primary purpose of the statute was to eliminate the distinction between legitimate and illegitimate children.[17] It is the only California statute defining parental rights.[18]

Given the law's long-standing tradition of allocating parental rights according to legal judgments about the sexual conduct of parents, it is significant that the UPA bases legal parentage on the existence of the parent-and-child relationship instead of the relationship between the parents.[19] According to Family Code section 7601, the *parent-and-child relationship* is defined as "the legal relationship existing between a child and the natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship."[20]

Under Family Code section 7602, "[t]he parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents." Thus, legal recognition of parentage under the UPA is based on "the existence of a parent and child relationship rather than on the marital status of the parents."[21] The UPA is not confined to a determination of paternity, as the parent-and-child relationship expressly includes the mother-and-child relationship.[22]

An overview of the UPA's provisions makes it clear that the intention of the statute is to achieve the state's policy objectives of legitimizing children by facilitating the establishment of legal parentage.[23] For example, a husband who consents to the artificial insemination of his wife is "treated in law as if he were the natural father" of the child who is conceived.[24]

The Family Code includes a comprehensive statutory scheme for establishing the paternity of children born to unmarried women.[25] Legal parentage can be established if both parents sign a form evidencing the father's voluntary acknowledgment of paternity, which has the legal effect of a judgment of paternity.[26]

UNDERLYING PUBLIC POLICIES OF THE UPA

The original intent of the UPA was to guarantee the equal rights of all children by ensuring their financial support from both parents and by protecting their emotional and physical needs derived from existing social relationships with their parents.[27]

Because the fact of maternity was obvious, social motherhood—a mother's relationship with her child—was inextricably linked to a woman's biological relationship to her child.[28] In contrast, biological paternity was uncertain, and, at the time the UPA was enacted, difficult to prove through scientific evidence.[29] As a result, legal fatherhood could be based on a biological and/or a social parent-and-child relationship.[30]

The statutory provisions of the UPA incorporated traditional assumptions about the connection between sexual reproduction and the nuclear marital family—the law presumed that biological parentage could be located within the social relationship between a husband and wife.[31] Parentage, in the context of a marriage, reflects a public policy seeking to preserve the marital family by focusing on the father's relationship to the mother. Under the UPA, a married man does not need to demonstrate that he is the biological father in order to establish legal parentage; his paternity is presumed by the fact that he is married to the mother.[32]

By contrast, an unmarried man's paternity can be based only on scientific evidence that he is the biological father through blood or DNA tests,[33] on proof of an executed and filed voluntary acknowledgment of paternity,[34] or on evidence showing that he "received the child into his home" and "openly held the child out as his own."[35] By requiring different evidence based on the marital status of the father, the UPA legitimizes children by presuming that they were born into an extant marital union. The conclusive marital presumption of Family Code section 7540 may be rebutted by proof that another man is the biological father. However, this claim may be raised only within two years of the child's birth.[36]

The policy here is to preserve the intact marital family over the claims of biological parents. The statutory scheme is designed to protect established parent-and-child relationships that are presumed to exist between the mother's husband and child.[37]

To summarize, when assigning parental status, both the Legislature and the courts have relied on several policy objectives. Specifically, the legal tradition for establishing parentage under the UPA has been based on protecting the intact marital family, as well as on protecting the biological and social relationships between parents and children.

Equal Rights of Children to Parental Support and Care

By statute, the establishment of legal parentage confers rights and imposes responsibilities, which cannot be divorced from each other.[38] The paramount policy concern is to ensure that children have, whenever possible, two legal parents who are responsible for their care and financial support. This goal is important because it is intended to serve the interest of both the state's children and the public.[39]

California case law and statutes further both interests regarding children's physical and emotional needs by ensuring that private individuals, rather than the taxpayers, are responsible for the financial support of their children.[40] The Legislature requires the courts to determine child support according to the mandatory principles of Family Code section 4053, which defines the interests of children as "the state's top priority" and provides that a parent's duty to pay child support is every parent's "first and principal obligation."[41] The essential purpose of the mandatory support principles is to guarantee a child's entitlement to "share in the standard of living of both parents."[42] This objective is served as long as the amount of child support is determined "according to the parents' circumstances and station in life."[43]

To enable children to share in the standard of living of both their parents, California has devised an algebraic formula for calculating child support.[44] The amount of support is calculated according to the net disposable income of both parents. One express legislative policy that is served by basing support on parental income is to ensure uniform statewide awards of child support, so that children who are similarly situated will not be treated differently.[45]

Unlike agreements for the voluntary assumption of parental rights and obligations, which are encouraged under the UPA, courts may not enforce the private agreements made between parents that deny or diminish the rights of their children. As a matter of law, an individual cannot simply terminate his or her parental rights—and potential obligations—as a parent.[46] Whereas a written contract relieving a parent of his or her parental rights and concomitant obligation of support is unconscionable, a written promise to furnish support by either a parent or nonparent is enforceable by statute.[47]

Equal Protection of Existing Parent-and-Child Relationships

Based on the presumption of "legitimacy," the existence of a marriage confers parental rights. As a result, children born into traditional families are guaranteed the right that courts will make decisions according to their best interest. However, many children today are born into nontraditional families—single-parent families, lesbian and gay families, and unmarried heterosexual families.[48] Each of these family forms contains its own unique composition of parental figures.

The U.S. Supreme Court recently recognized that society's traditional definition of the "American family" has changed dramatically over the past several decades.[49] In *Troxel v. Granville,* a case regarding the visitation rights of grandparents and other third parties, Justice O'Connor observed: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."[50]

The American family is no longer characterized by a household of children and their two married biological parents. As noted by Justice Scalia in *Michael H. v. Gerald D.,*[51] the interests of the nonmarital unitary family is accorded constitutional protections: "The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children."[52]

Although the UPA did not anticipate all of the future permutations in the creation of biological and social families, it remains the only California statute defining parentage. To resolve the emerging parentage disputes in the context of these contemporary forms of families, courts have adhered to the underlying policies of the UPA by interpreting its provisions to protect existing social relationships between children and their parents. For example, courts have liberally construed its provisions to "legitimize" children living in alternative families by applying the paternity presumptions to women and nonbiological parents.[53]

These decisions affirm that legitimizing children and protecting their interests require legal recognition of the existing relationship between a parent and child, regardless of the parent's gender, marital status, or biological connection to the child.[54] In so doing, case law has clarified that the objective of the statutory presumptions of parentage is not to identify or locate biological parents; rather, the presumptions exist to protect the best interest of children.[55]

The statutory presumptions of paternity are designed to serve the state's policy of protecting a

child's existing relationship with a person whom the child knows as his or her parent. The primary purpose of determining legal parentage under Family Code section 7611(d), then, is to protect a *child's* perspective of his or her family by legally recognizing parentage in a person with whom the child has developed an actual parent-child bond.[56]

Indeed, the California Supreme Court and Courts of Appeal have categorically rejected biology as a factor in attaining status as a presumed parent under Family Code section 7611(d).[57] In *In re Nicholas H.,* the California Supreme Court concluded that a nonbiological father qualified as a presumed parent based on undisputed evidence that he had lived with the child for "long periods of time" and provided the child with "significant financial support…and has consistently referred to and treated Nicholas as his son."[58] The court focused its analysis on the "undisputed evidence that Nicholas has a strong emotional bond with [the father]" to find that the nonbiological father was a presumed parent.[59]

Likewise, in a recent decision, *In re Salvador M.,* the Court of Appeal, Fifth Appellate District, held that a child's adult half-sister, who acted as the child's de facto parent, was the child's presumed and legal parent under Family Code section 7611(d).[60] In that decision the court stated that "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family."[61] The court in *Salvador M.* concluded that a woman's parental relationship to an 8-year-old child "resulting from years of living together in a purported parent child relationship…should not be lightly dissolved."[62] Consistent with the policies of the UPA, the California courts demonstrate a clear preference for allocating parentage according to the nature of the relationship between the child and his or her parent, rather than the nature of the relationship between the parents.

PARENTAGE IN CASES OF ASSISTED REPRODUCTION AND REPRODUCTIVE TECHNOLOGIES

Recent advances in reproductive technologies and science have led to the creation of even more unique family forms, as procreation no longer depends on sexual reproduction and can occur outside of marriage. Reproductive technologies have further deconstructed the traditional definition of *family* by dividing parentage into three components—genetics, gestation, and intent.

According to one legal scholar in the area of family law, Professor Janet Dolgin, surrogacy jurisprudence is beginning to "reflect demographic and ideological changes that have been altering the scope and meaning of family for decades."[63] Professor Dolgin further argues that judicial responses to surrogacy disputes, in seeking to resolve the various claims to maternity that they present, reflect a willingness to revise the model of the traditional marital family to make it more malleable and complex.[64]

In *Johnson v. Calvert,* the California Supreme Court addressed these novel issues in a parentage case of first impression—a child's maternity was disputed as a result of a gestational surrogacy contract.[65] *Johnson* involved a surrogacy arrangement in which an egg donated by the wife and fertilized by the husband's sperm was implanted in a gestational surrogate mother.[66] Prior to the birth, the parties signed a contract, agreeing that the husband and wife would be the child's parents and would raise the resulting child in their home.[67]

Under the terms of a signed surrogacy contract, the surrogate mother, Anna Johnson, agreed that she would relinquish "all parental rights" to the child in favor of the marital couple, Mark and Crispina Calvert.[68] In return, the Calverts agreed to pay Anna $10,000.[69] Before the child was born, relations deteriorated; both Anna and Crispina claimed to be the unborn child's mother, and both sought a declaration of legal maternity under the UPA.[70] Addressing the claims made by the two women to maternity of the same child, the Supreme Court observed that the Legislature did not address this issue at the time it enacted the UPA: "Passage of the [UPA] clearly was not motivated by the need to resolve surrogacy disputes, which were virtually unknown in 1975."[71] Notwithstanding this lack of express legislative guidance, the court in *Johnson* found that the UPA applied to *any* determination of parentage.[72] It concluded that the UPA must

be interpreted on an ad hoc basis: "Not uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature."[73]

THE LEGAL FRAMEWORK OF *JOHNSON*

In *Johnson,* the court established a new framework for resolving the parentage of children born through assisted reproduction. First, it found that both the surrogate mother and the genetic mother had equally valid claims to maternity under the UPA.[74] The court in *Johnson* relied on the statutory language of Family Code section 7610(a) to treat maternity claims equally when they are demonstrated by "proof of having given birth" or by any other means available under the UPA.[75] Specifically, it determined that Anna could show she was the mother by "proof of having giving birth," and Crispina could show she was the mother by proof of her genetic relationship.[76]

However, a finding that both women were legal mothers under the UPA would have resulted in the child's having three parents.[77] Even though advances in science and technology have made it possible for the components of biological motherhood—genetics and gestation—to be divided between two women, the court declined to establish legal parentage in two women. Having determined that finding two legal mothers was inappropriate under the specific circumstances in *Johnson,* the court did not foreclose the possibility that a different set of factual circumstances could justify a court's conclusion that two women were the "natural" and legal mothers of the same child. ("We decline to accept the contention . . . that we should find the child has two mothers. Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here.")[78]

In *Johnson* the court resolved the parentage dispute by turning to evidence of the parties' intentions. To "break the tie" between the two women, *Johnson* looked to the preconception parenting intentions of the parties.[79] Relying on legal scholars, the court developed a new rule and held that "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[80] Because the genetic mother, Crispina, "intended to bring about the birth of a child that she intended to raise as her own," the court held that she, not the surrogate, should be recognized as a legal parent.[81]

PREFERENCE OF MARITAL FAMILY/SOCIAL RELATIONSHIPS

In addition to the explicit intent of the parties as stated in their surrogacy contract in *Johnson,* the intent of the genetic parents was presumed from the fact that they were a married couple living together in a committed relationship. The court in *Johnson* linked the genetic parents' marital relationship to its ultimate determination that they were the only biological, intentional, and legal parents.[82] The fact that the intended parents were in a committed marital relationship contributed to the court's legal conclusion that the Calverts should be considered the legal parents, as they jointly took steps to use reproductive procedures that created a child.[83]

Specifically, the court in *Johnson* found that recognizing legal parentage in a third party would have interfered with the marital family, their familial privacy, and their rights to make joint decisions about how to raise their child: "To recognize parental rights in a third party with whom the [marital family] has had little contact . . . since shortly after the child's birth would diminish [the genetic mother's] role as mother."[84]

Consideration of the marital status of the parties as an element of intent in *Johnson* is consistent with well-established California law regarding the issue of parentage in the context of a marital relationship. When the social interest of maintaining the marital family is considered against the interests of biological fathers to maintain relationships with their children, the former usually prevails over the latter.[85] Courts construing paternity statutes have reiterated this public policy.[86] For example, in *Michael H. v. Gerald D.,* the U.S. Supreme Court upheld California's conclusive presumption of paternity, finding that the statute furthered "traditions" protecting the privacy and autonomy of the marital family.[87] As in *Johnson,* the biological father in *Michael H.* was denied paren-

tal rights because he was viewed as a stranger to the marriage.

BEST-INTEREST ANALYSIS?

In her dissenting opinion in *Johnson,* Justice Kennard criticized the majority for relying on contract and property law as a basis for determining legal parentage. "Although the law may justly recognize that the originator of a concept has certain property rights in that concept, the originator of the concept of a child can have no such right, because children cannot be owned as property."[88]

The court in *Johnson* was able to conclude that property and contract principles outweighed a best-interest analysis in its determination because it considered legal parentage before the child was born. The majority in *Johnson* rejected the best-interest standard in favor of legal concepts borrowed from the arenas of intellectual property and commercial contracts:[89] "The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers."[90]

Arguably, the best-interest standard should be considered relevant because it reflects the policies underlying the UPA to recognize existing parent-and-child relationships. This approach is consistent with the well-established case law regarding presumed parentage under Family Code section 7611(d), which relies on the best-interest standard as an important policy and rationale for the allocation of parental rights under the statutory scheme.

Many legal scholars advocate for the application of a best-interest standard as a factor for deciding legal parentage in the context of reproductive technologies. In a recent law review article, Professor Ilana Hurwitz argued for the inclusion of a best-interest analysis in determining parentage in the context of reproductive technologies:

> Within a "best interests" rubric, a court may evaluate preconception intent, genetics, and gestation. In addition, the standard enables a court to consider other factors crucial to a child's well-being such as continuity of relationship [and] nurturing capacity of maternal claimants.... Cases present manifold factual constellations—children with differing needs; claimants with differing capacities for motherhood; varying situational aspects. Contextual analysis enables a judge to investigate each claim, to weigh each factor as circumstances warrant, and to create a parental composition tailored to meet the needs of a particular child.[91]

In the first California case to address a surrogacy arrangement, *Adoption of Matthew B.,*[92] the Court of Appeal, First Appellate District, focused entirely on the child's best interest. "The primary casualty of this conflict is a child caught in the cross fire.... The best interests of this young child must be our paramount concern."[93] Since the agreement was "fully performed," the court in *Matthew B.* determined that ruling on the legality or illegality of the surrogate contract was unnecessary.[94] But the court went on to point out the proper focus for resolution of the dispute: "Here, the state has a paramount interest in Matthew's welfare.... We can never ignore the child's best interests, 'no matter what preliminary action its parent or parents may have taken'. Indeed, the child's welfare *is 'the controlling force* in directing its custody, and the courts will always look to this rather than to whims and caprices of the parties.' "[95]

Explicit consideration of the best-interest standard as part of the analysis in the allocation of parental rights in the context of reproductive technologies is not inconsistent with the decision in *Johnson.* The court there did not purport to create an absolute rule that intent always governs parentage in the context of artificial reproductive technologies. Rather, the court in *Johnson* announced the intent standard as a *presumption* for deciding parentage: "[I]ntentions that are voluntarily chosen, deliberate, express and bargained-for ought to presumptively determine legal parenthood."[96]

As described by Professor Marjorie Shultz and quoted in *Johnson,* the essential purpose of an intent-based rule is to foster a child's best interest: "Honoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike."[97] Relying on Shultz, the court in *Johnson* noted that the intent model offers a reliable means

to establish parentage because it is meant to predict the best interest of a child: "[T]he interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being'."[98]

Indeed, the California Supreme Court has consistently emphasized the importance of the best-interest standard as a means to guarantee a child's "well recognized right" to "stability and continuity" by protecting the child's permanent and actual custodial arrangements.[99] The Legislature has established California's public policy for ensuring a child's best interest when child custody and visitation are at issue: "[I]t is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children…."[100]

PRINCIPLES ESTABLISHED BY *JOHNSON*

The decision in *Johnson* established several basic principles. First, the court rejected the contention that explicit legislative guidance is required before courts may resolve new and unanticipated issues relating to the parentage of children born through reproductive technologies. Based on the long-standing principle that courts must often "construe statutes in factual settings not contemplated by the enacting legislature," the court held that the UPA provided "a mechanism to resolve this dispute, albeit one not specifically tooled for it."[101]

Second, the court concluded that the UPA must be applied in a strictly gender-neutral manner, even where the language of the statute is couched in gender-specific terms. Consistent with Family Code section 7650, the court held that the statutory means available to establish a father-child relationship must also "apply in an action to determine the existence or nonexistence of a mother and child relationship."[102]

Finally, rather than adopting a mechanical test for determining parental rights under the UPA, the court developed an approach that looked to the parties' intentions. *Johnson* affirms that "the courts have both the power and the obligation to apply the UPA—and go beyond it if necessary—to resolve the parentage of children who are born through artificial insemination, even if, as seems likely, the legislature did not specifically contemplate lesbian families [or surrogates] when the statute was enacted."[103]

ASSISTED-REPRODUCTION CASES SINCE *JOHNSON*

Relying on the reasoning and policies articulated in *Johnson,* the Courts of Appeal have protected the rights of children conceived through reproductive technologies by recognizing legal parentage in their "intended" parents.[104] Since *Johnson,* courts have been called upon to determine parentage in situations that are increasingly complicated by varying forms and new uses of reproductive technologies. The clear trend in all these cases is to expand the definition of *legal parentage,* particularly if there is an existing parent-child relationship.[105]

All of the California cases addressing these issues reveal that judicial determinations of parentage continue to be driven by the traditional public policies and original intent of the UPA. When people use assisted reproduction to create a child, the case law holds that *two* legal parents should be found whenever possible, irrespective of the marital status of the parents.[106]

Thus, when one person uses reproductive technologies with the intent to be a single parent, courts have resolved the competing claims asserted by other potential parents by finding that there are two legal parents. Similarly, when there are three persons seeking to establish parental rights to the same child, courts have recognized the child's family as consisting of only two parents.[107]

Two well-established themes from the UPA have been applied to the area of technological conception—children's interests come first, and two legal parents are preferable to one parent or three parents. This rule is true even if (1) the two people are complete strangers to each other, (2) the parents' relationship has ended, or (3) the second person seeks a determination that he or she is not the parent.[108]

Since *Johnson* there have been two surrogacy cases in which the appellate courts have determined parentage under the UPA. In *In re Marriage of Moschetta,*[109] the Court of Appeal addressed a traditional surro-

gacy arrangement. In that case, the surrogate mother was both the genetic and the gestational parent; the intended mother, who was married to the biological father, had no biological connection to the child.

To conclude that the surrogate mother was the legal mother under the UPA, the court in *Moschetta* turned to the analysis of *Johnson* but found that it was not necessary to look to intent under the facts presented: "[T]he framework employed by *Johnson v. Calvert* of first determining parentage under the Act is dispositive of the case before us. In *Johnson v. Calvert* our Supreme Court *first* ascertained parentage under the Act; only when the operation of the Act yielded an ambiguous result did the court resolve the matter by intent as expressed in the agreement. In the present case, by contrast, parentage is easily resolved in [the genetic/gestational surrogate] under the terms of the Act."[110]

In *Moschetta,* the court concluded that the intent standard of *Johnson* was inapplicable because it found no "tie" to break between the intended, nonbiological mother and the genetic/gestational surrogate mother.[111] Applying the framework established by *Johnson,* the court determined that the two women did not have equally valid claims to maternity under the UPA because only the surrogate mother could provide proof of maternity under Family Code section 7610(a) as set forth in *Johnson.*[112] With that finding the court held that it was unnecessary to look to the intent of the parties to decide which woman was the legal mother.[113]

To justify its reasoning, the court in *Moschetta* noted that all of the justices in *Johnson* agreed with the framework established by the majority, that before employing the intent test it was necessary to conclude that the parties had equal claims to maternity under the UPA: "Significantly, both Justice Arabian's concurring and Justice Kennard's dissenting opinions *agree* with the majority opinion's basic structure of first concluding the genetic mother and the birth mother were 'tied' under the Act and then breaking the tie."[114]

In *In re Marriage of Buzzanca,* a husband and wife agreed to use reproductive technologies to create a child with the assistance of anonymous sperm and ovum donors and a gestational surrogate.[115] The child was not biologically related to either the husband or wife, and the parties separated before the child was born. The only person who sought parental rights was the intended mother, Mrs. Buzzanca. The intended father, Mr. Buzzanca, denied paternity and requested that he not be held responsible for child support based on an alleged private agreement he had entered with Mrs. Buzzanca.[116]

The court in *Buzzanca* relied on Family Code section 7613(a), which provides that a husband who consents to the artificial insemination of his wife is the legal father of the child created by the insemination, to find that husband and wife were both legal parents under the UPA. In *Buzzanca* the court justified its conclusion because the husband and wife engaged in "*acts* which *caus[ed] the birth* of a child."[117]

The court in *Buzzanca* followed *Johnson* and relied on an artificial insemination case decided in 1968, prior to the enactment of the UPA, *People v. Sorensen,*[118] to find that the intention to parent is determined by evidence of procreative conduct, such as consenting to reproductive procedures with the hope of creating a child to raise as one's own. In *Sorensen,* the California Supreme Court held that a nonbiological father was the legal parent based on the fact that he consented to the artificial insemination of his wife, a procreative act that caused the birth of a child.[119] Because the husband was "directly responsible" for the "existence" of the child and because "without [his] active participation and consent the child would not have been procreated," he was found to be a legal father.[120]

Relying on the reasoning in *Sorensen,* the court in *Buzzanca* construed Family Code section 7613(a) liberally to determine that the husband was a parent based on his consent to the use of reproductive technologies to create a child. The court also held that the wife could prove that she was the legal mother under Family Code section 7613(a) based on her consent to the artificial insemination of another woman, conduct that resulted in the birth of a child.

Because *Johnson* relied on the statutory language of Family Code section 7610(a) to treat maternity claims equally when demonstrated by "proof of having given birth," or by other means allowed under the UPA,

Buzzanca reasoned that proof of maternity under Family Code section 7613(a) is no different from a maternity claim predicated on proof of a genetic and/or gestational tie.[121] Thus, Mrs. Buzzanca could prove her maternity by proof of her consent to the artificial insemination of another woman under Family Code section 7613(a).[122]

THE DECISIONS IN *ELISA B.*, *K.M.*, AND *KRISTINE H.*

Under Family Code section 297.5(d), registered domestic partners (and former or surviving domestic partners) of either partner now have the same rights and responsibilities with respect to a child of either of them as those of spouses (and former or surviving spouses).[123] By enacting this statutory scheme, the Legislature has clarified its intention that the same rules that apply to determining the parentage of children born to married parents must be applied to children born to registered domestic partners.

Although Family Code section 297.5 provides guidance regarding children born to same-sex parents after January 1, 2005, it does not resolve questions about the legal parentage of children born to same-sex couples prior to that date or of children born to same-sex couples not registered as domestic partners when their children were born.[124]

Elisa B., Kristine H., and *K.M.* are parentage cases that arose prior to the effective date of the current domestic partner statute. In guaranteeing protection to children born into nontraditional families, the decisions in these cases demonstrate important themes underlying the UPA, such as preventing discrimination based on marital status of the parents and preserving existing biological and social relationships between parents and children. Because the California Supreme Court recognized the possibility that a family may have two parents of the same sex, well-established principles and existing case law could readily be applied to determine parentage under the circumstances of the children in all three cases.

Johnson stands for the proposition that the UPA is a flexible document. So when the Supreme Court was called upon again to address maternity claims under the UPA in circumstances that "were virtually unknown in 1975,"[125] the court simply followed the principle of statutory construction that it announced in *Johnson:* "Not uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature."[126]

The court concluded that there can be two natural and legal mothers under the UPA without an adoption.[127] In so holding, the court guaranteed *Johnson*'s promise that the "UPA applies to *any* parentage determination."[128] All of the justices of the California Supreme Court were unanimous in finding that California law recognizes the establishment of two natural and legal same-sex parents of the same child.

ELISA B. v. SUPERIOR COURT

In *Elisa B.,*[129] a same-sex couple—Emily B. and Elisa B.—planned to have children together using artificial insemination by an anonymous sperm donor.[130] Emily gave birth to twins in 1998, one of whom had Down syndrome.[131] Before the twins' birth, the couple decided that Emily would stay home to care for the children and Elisa would be the family's breadwinner.[132] The couple's relationship dissolved 18 months later, and Elisa eventually cut off all contact and support.[133] Emily applied for public assistance from the state, which, in turn, filed an action for child support against Elisa.[134]

Two Natural and Legal Mothers

Until very recently, California courts refused to acknowledge the existence of more than one legal parent of the same sex. The decision in *Elisa B.* clarified that the statement in *Johnson* that California law recognizes only "one natural mother" was confined to the circumstances presented in that case;[135] namely, a finding of two mothers in *Johnson* would have left the child with three parents and imposed a third-party stranger into the intact marital family.

Indeed, as noted by the court in *Elisa B.,* since the time *Johnson* was decided there have been significant developments in statutory and case law regarding the legal rights of same-sex parents. There are now "com-

pelling reasons" to find that a child may have two legal parents of the same sex who have equal status in terms of their relationship to the child.[136]

> We perceive no reason why both parents of a child cannot be women. That result now is possible under the current version of the domestic partnership statutes….
>
> Prior to the effective date of the current domestic partnership statutes, we recognized in an adoption case that a child can have two parents, both of whom are women…. If both parents of an adopted child can be women, we see no reason why the twins in the present case cannot have two parents, both of whom are women.[137]

Most important, the Supreme Court's unanimous holding that there can be two legal mothers under the UPA overrules more than 15 years of California appellate court decisions denying legal protection to children born to same-sex parents.[138] Those cases held that a lesbian partner who was not a biological or an adoptive parent was not entitled to establish parentage under any provisions of the UPA.[139]

In 1991, the Court of Appeal, First Appellate District, in *Nancy S. v. Michele G.,* addressed whether the birth mother's lesbian partner, who was neither biologically nor adoptively connected to a child, could be considered a parent.[140] The court held that the status of the lesbian partner as a parentlike figure did not entitle her to custody or visitation rights.[141] The court refused to expand the definition of *parent* beyond its traditional meaning. It stated that courts should not adopt novel theories by which a nonparent could acquire the rights of a parent because they would then face years of unraveling the complex practical, social, and constitutional ramifications of this expanded definition of *parent.*[142]

In *Elisa B.,* the California Supreme Court expressly concluded that *Nancy S.* and two other older cases were incorrectly decided because those cases failed to adopt a gender-neutral application of the UPA.[143] Moreover, the court was clear that children born into families consisting of two same-sex parents could not be treated with bias or stigma based on the status of their birth. Specifically, *Elisa B.* cites to the purpose underlying the enactment of the UPA: "to eliminate distinctions based upon whether a child was born into a marriage, and thus was 'legitimate,' or was born to unmarried parents, and thus was 'illegitimate.'"[144] *Elisa B.* relies on the fundamental purpose of the UPA, which "provides that the parentage of a child does not depend upon 'the marital status of the parents.'"[145]

Social Relationship/Presumption of Paternity

The Supreme Court specifically concluded that Elisa's parentage could be established under Family Code section 7611(d).[146] The court noted that when *Johnson* was decided in 1993, case law regarding the presumed-paternity statutes had not previously addressed whether the statutes should apply to women or whether a biological relationship to the child was a prerequisite to meeting the requirements of Family Code section 7611(d).[147] Since that time, both issues have been resolved. A person's status as a presumed parent may be established regardless of gender or biological connection.[148]

As previously discussed, the statutory presumptions of paternity are designed to serve the state's policy of protecting a child's relationship with a person whom the child knows as his or her parent. The California Supreme Court, in *In re Nicholas H.,* recently articulated the well-established purpose of determining legal parentage under section 7611(d)—to protect a child's perspective of his or her family by legally recognizing parentage in a person with whom the child has developed an actual parent-child bond.[149] As the court has made clear, the state has a compelling interest in protecting established parent-child relationships, regardless of whether they are based on marriage or biology.[150]

The decision in *Elisa B.* directly relied on these case law developments under Family Code section 7611(d). After *Elisa B.* it is much clearer that the statutory presumption of parentage actually does apply equally regardless of biology, gender, sexual orientation, or marital status.[151] *Elisa B.* holds that the presumption applies regardless of whether the children already have one identified mother. The fact that the other legal parent is also a woman has no legal relevance. Just as in *Nicholas H.,* the court found that the nonbiological

mother in *Elisa B.* lived with the children and treated them in all respects as her children and therefore was a parent under the UPA.

Procreative Conduct

Elisa B. also addressed a concern that was raised by the court in *Nicholas H.:* the potential danger of imposing legal parentage under Family Code section 7611(d) on a nonbiological parent unwilling to accept the role and responsibilities of parenthood.[152] Unlike the father in *Nicholas H.,* Elisa was "unwilling to accept the obligations of parenthood."[153] As a result, the court in *Elisa B.* was required to determine whether the situation was "an appropriate action" for rebuttal of the presumption of Family Code section 7611(d) based on evidence that Elisa B. was not the biological parent.[154]

In this part of its analysis, the court considered evidence of Elisa's intentional procreative conduct and compared her to persons in other cases in which legal parentage had been based on similar procreative conduct: "[Elisa] actively assisted Emily in becoming pregnant with the expressed intention of enjoying the rights and accepting the responsibilities of parenting the resulting children.... Elisa's present unwillingness to accept her parental obligations does not affect her status as the children's mother based upon her conduct during the first years of their lives."[155]

Following the reasoning of *Sorensen,* the court in *Elisa B.* stated: "A person who actively participates in bringing children into the world, takes the children into her home and holds them out as her own, and receives and enjoys the benefits of parenthood, should be responsible for the support of those children—regardless of her gender or sexual orientation."[156]

Based on its application of the case law for establishing parentage in the context of a husband's consent to the artificial insemination of his wife, the court in *Elisa B.* found that, as in *Nicholas H.,* the circumstances did not present an "appropriate action" to rebut the presumption with proof that Elisa was not the children's biological mother because "she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother,...and there are no competing claims to her being the children's second parent."[157]

In sum, the court's approach to the analysis of Elisa's parentage under Family Code section 7611(d) not only involves the presumed-parentage cases but also invokes the language, policies, reasoning, and holdings of the artificial insemination case law. These are the same policies and reasoning upon which Family Code section 7613(a) was established.

K.M. v. E.G.

In *K.M.,* a lesbian couple took steps to have a child together. K.M. contributed her ova, which were fertilized with sperm from an anonymous donor and implanted in her partner, E.G.[158] Both women could claim maternity as either the genetic or the gestational mother of the twin girls, who were born in 1995. K.M. and E.G. co-parented the girls until the couple separated in 2001.[159] After the separation, K.M., the genetic mother, filed an action asking the court to determine that she was a parent and to issue a custody and visitation award.[160] E.G., the gestational mother, argued that K.M. had no right to parent the children, largely because, when they were in the hospital for the ovum donation, K.M. had signed a standard hospital form that, among pages of information about the medical procedure, included a section allegedly waiving her parental rights to the children.[161]

Both the trial court and the appellate court found that K.M. was not a parent on the grounds that she was an "ovum donor" and that the parties had orally agreed that only E.G. would be the parent.[162] The California Supreme Court reversed the lower courts' decisions, finding that K.M. did not intend to be just a donor and that she and E.G. were the genetic, gestational, and legal parents of the twins under the UPA: "[W]e agree that K.M. is a parent of the twins because she supplied the ova that produced the children, and Family Code section 7613, subdivision (b),...which provides that a man is not a father if he provides semen to a physician to inseminate a woman who is not his wife, does not apply because K.M. supplied her ova to impregnate her lesbian partner in order to

produce children who would be raised in their joint home."[163]

After it decided that K.M. was not a donor, the Supreme Court reached a simple yet eloquent conclusion: K.M. and E.G. were the legal parents of the twins because, as the genetic and gestational parents, they had equally valid claims under the UPA.[164] As in *Elisa B.,* the court held there could be two legal mothers without an adoption. Because it found there was no "tie" to break between the parentage claims of K.M. and E.G., the court determined that it was not necessary to look to evidence of the parties' intentions to decide legal parentage.

Donor vs. Parent

To conclude that K.M. was not a donor, the court compared K.M. and E.G. to the marital couple in *Johnson,* finding that both couples similarly intended "to produce a child that would be raised in their own home."[165] In comparing K.M. and E.G. to the Calverts, the court unequivocally found that K.M. was not a "true" donor:

> It is undisputed, . . . that the couple lived together and that they both intended to bring the child into their joint home. . . . [T]he present case, like *Johnson,* does not present a "true 'egg donation' situation."
>
> K.M. did not intend to simply donate her ova to E.G., but rather provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home.[166]

The court properly dismissed the legal relevance of the ovum-donor consent form under the circumstances of *K.M.* It noted that the law was clear that private parties may neither create nor destroy parental rights based on their own subjective agreements or understandings about the law.[167] Indeed, California has never assigned a child's legal parentage based on agreements between private parties.[168] It is well established that parents cannot, by agreement, limit or abrogate a child's right to support.[169] And parties who procreate by means of assisted reproduction are just as responsible for their children as those who do so "the old-fashioned way."[170]

Family Code Section 7613(b)

The Legislature enacted Family Code section 7613(b) to provide clarity regarding the parental rights of sperm donors by eliminating any rights or obligations of a donor who provides his "semen to a licensed physician for use in artificial insemination of a woman other than the donor's wife."[171] There is no comparable legislation in California governing the parental rights of ovum donors, and there is no precedent holding that Family Code section 7613(b) applies equally to ovum donors.

Based on the evidence, the court found that Family Code section 7613(b) did not apply to a woman who, like K.M., donated her ova to her lesbian domestic partner with whom she planned to raise the resulting children together in their joint home. As shown by the court's reasoning and its citation to a related Colorado Supreme Court case,[172] the court intended to treat K.M. and E.G. exactly as it would have if they had been an unmarried heterosexual couple.[173] A man who statutorily waived parental rights at the time he donated sperm cannot be denied paternity if he has taken the child into his home and loved and cared for the child as a parent.[174]

Other California cases have concluded that, when a sperm donor provides his semen to a physician and his sperm is used to inseminate a woman who is not his wife, the donor's parental rights will not be terminated under Family Code section 7613(b) where the facts warrant a different outcome.[175] For example, in *Robert B. v. Susan B.,* a fertility clinic made a mistake when it used sperm provided by a married man who did not intend to be a donor, and implanted the sperm in a single woman who requested sperm and ova from anonymous donors.[176] The Court of Appeal determined that the statute did not apply to terminate the donor's parental rights, even though his sperm was provided to an unknown recipient through a physician: "In order to be a donor under section 7613(b) a man must provide semen to a physician for the purpose of artificially inseminating 'a woman other than the donor's wife.' It is uncontested that Robert did not provide his semen for the purpose of inseminating anyone other than [his wife]. "[177]

In *Jhordan C. v. Mary K.,* the court declined to apply Family Code section 7613(b) to terminate the parental rights of a known sperm donor.[178] In that case, the biological mother obtained the sperm directly from the donor without the assistance of a doctor.[179] The mother claimed that the parties agreed prior to the donation that the donor would not be involved as a parent and argued that his rights should be terminated under Family Code section 7613(b).[180] The mother argued that the court should apply the statute because the donor's agreement that he would not be a parent was the functional equivalent of the requirement that a donor provide his sperm to a physician.[181] To hold the statute inapplicable to the donor in this case, the court in *Jhordan C.* focused on the parties' conduct after the donation of sperm, including visits between the mother and donor during the mother's pregnancy, the mother's agreement to the donor's establishment of a trust fund for the child, the listing of the donor as father on the birth certificate, and the donor's visits to the mother and child.[182]

In *K.M.* the court did not reach the issue of whether the sperm donor statute could or should be applied equally to ovum donors. "Even if we assume that the provisions of section 7613(b) apply to women who donate ova, the statute does not apply under the circumstances of the present case."[183] However, unlike almost every other provision of the UPA, equal application of that statute is factually impossible. In contrast to a sperm donor, an ovum donor can only "donate" her ova by providing ova to a "licensed physician." The statute cannot be applied equally, then, because a sperm donor has the option of donating his sperm without the assistance of a physician, which enables a man to donate sperm under the statute while preserving his parental rights.

The Legislature, not the court, is the appropriate branch to resolve the myriad and complex policy questions raised by the issue of whether Family Code section 7613(b) should apply equally to ovum donors.[184]

Framework of Johnson

After it found K.M. was not a donor, the court turned to the legal framework of *Johnson* and concluded that both K.M. and E.G. were legal parents under the UPA. First, the court found that E.G. and K.M. could both prove their maternity of the children under Family Code section 7610(a)—E.G., because she gave birth to the children, and K.M., because she was the genetic mother. "K.M.'s genetic relationship with the twins constitutes evidence of a mother and child relationship under the UPA…."[185]

Under the circumstances of *K.M.,* because California recognizes two natural mothers, the court concluded there was no "tie" to break between K.M. and E.G. Specifically, the court found that any parental rights afforded to K.M. would not come at E.G.'s expense or impair her parental bond with the children.[186] In *Johnson,* the court determined that the child should have two parents, not three. In *K.M.,* the question was whether the twins should have one legal parent or two. In finding that the children should have *two* parents instead of one, *K.M.* followed the well-established case law and public policies of the UPA.

The court in *K.M.* held that it is unnecessary to look to evidence of intent to decide parentage when there is no "tie" to break between two biological parents who have equally valid claims when their claims are not mutually exclusive. Thus, the court decided K.M. and E.G. were the legal parents based on the fact that both women could prove their maternity under Family Code section 7610(a). This is the precise approach adopted by the appellate court in *Moschetta:* "[T]he framework employed by *Johnson v. Calvert* of first determining parentage under the Act is dispositive of the case before us.... [O]nly when the operation of the Act yielded an ambiguous result did *[Johnson]* resolve the matter by intent…."[187] Like the donor fathers in *Robert B., Jhordan C.,* and *Moschetta,* K.M. is the second biological parent who came forward to assume responsibility for the children with whom she was genetically related. Similar to the genetic fathers of those cases, K.M. offered proof of a biological relationship to her children that was sufficient to establish her legal parentage.

ESTOPPEL: *KRISTINE H. v. LISA R.*

In *Kristine H.,* two women who had been in a long-term relationship decided to have a child through

artificial insemination.[188] Prior to the birth of the baby, the couple, relying on *Johnson,* obtained a judgment by stipulation that although Kristine was pregnant with the baby they would both be the parents of the unborn child.[189]

Kristine, Lisa, and the child lived together as a family in a home they shared.[190] When the child was about 2 years old, the women ended their relationship and Lisa moved out of the family home.[191] Following their separation and termination of their domestic partnership, Kristine sought to sever Lisa's status as a legal parent by filing a motion to vacate the judgment declaring them both parents of the child.[192]

After finding that the trial court had subject-matter jurisdiction to determine the existence or nonexistence of parent-child relationship, the Court of Appeal, Second Appellate District, held that the family court lacked authority under the UPA to enter a judgment of parentage because "[a] determination of parentage cannot rest simply on the parties' agreement."[193] In reversing that decision, the California Supreme Court concluded that Kristine was estopped from challenging the validity of the stipulated judgment that she and Lisa were both parents. The court found it unnecessary to decide whether the judgment was valid because it found that Kristine was estopped from challenging the judgment: "Given that the court had subject matter jurisdiction to determine the parentage of the unborn child, and that Kristine invoked that jurisdiction, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years, it would be unfair both to Lisa and the child to permit Kristine to challenge the validity of that judgment."[194]

APPLICATION OF *ELISA B., KRISTINE H.,* AND *K.M.* TO FUTURE CASES

In *Elisa B., K.M.,* and *Kristine H.,* the California Supreme Court did not decide the parental rights of the parties based on the intent standard of *Johnson* or on the artificial insemination statute, Family Code section 7613(a). But by relying on the reasoning, standards, and language of *Johnson* and Family Code section 7613(a), the court's decisions provide authority for establishing legal parentage under these theories in future cases involving similarly situated nontraditional families.

Specifically, in all three cases the court held that when a couple deliberately brings a child into the world through the use of assisted reproduction, both partners are the parents, regardless of their gender or marital status. Further, the court enunciated the following principles in *Elisa B., Kristine H.,* and *K.M.,* all of which support the application of *Johnson* and Family Code section 7613(a) to establish legal parentage in future cases:

- Marital status, gender, and sexual orientation of the parents should not be used as a basis to deny equal application of the establishment of parentage under the UPA.
- California public policy has a preference for two parents instead of one.
- Family Code section 7613(a) applies equally to women.
- The rule that a husband is the lawful parent based on his consent to the artificial insemination of his wife by an anonymous sperm donor also applies to same-sex and unmarried parents.
- Conduct of a same-sex couple to participate in and use artificial insemination or in vitro fertilization, with intent to produce a child to raise together in their joint home and treat as their own, is relevant to the determination of parentage under the UPA.

INTENT

The California Supreme Court found that the parties in *Elisa B., K.M.,* and *Kristine H.,* engaged in deliberate procreative conduct that resulted in the birth of their children, not unlike that of the married couples in *Johnson* and *Buzzanca.* In *Johnson,* the court held that when a couple intends to have children together and uses assisted reproduction to procreate, they will be treated as the legal parents of any children born to

them as a result of their procreative conduct: "[The Calverts] affirmatively intended the birth of the child and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist."[195]

The court discussed the intentional procreative conduct of the couples in all three decisions. As in *Johnson,* the court found that each of the couples initiated and participated in medical procedures that caused children to be born.[196] But for the couples' procreative efforts the children in each of these cases would not exist. For example, the court compared the joint preconception parenting intentions of K.M. and E.G. as a couple, to raise a child together in their joint home, to the similar intentions of the marital couple in *Johnson.*[197] In *K.M.* the court found that the joint parenting intentions of Mr. and Mrs. Calvert were analogous to those of K.M. and E.G: "The circumstances of the present case are not identical to those in *Johnson,* but they are similar in a crucial respect; both the couple in *Johnson* and the couple in the present case intended to produce a child that would be raised in their own home."[198]

To conclude that it was not "an appropriate action" for the presumption of Family Code section 7611(d) to be rebutted, the court in *Elisa B.* cited the presumed mother's procreative conduct and preconception intent: "[S]he actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother…."[199]

The reliance of the court in *Elisa B.* and *K.M.* on the reasoning of *Johnson* provides authority for application of that standard to establishing legal parentage based on intent for same-sex parents in future cases. A finding that same-sex parents are the intentional parents would not conflict with the principles and purpose of *Johnson,* so long as the parentage claims recognized are not mutually exclusive. Similar to the Calverts, a same-sex couple or unmarried heterosexual couple can be the intended parents, as there is no need to "break the tie" between two parents who intend to use reproductive technologies to create a family together. In fact, the policy preference in California is for two parents instead of one or three.[200]

Under *Elisa B., K.M.,* and *Kristine H.* the intent standard should apply to two parents regardless of their marital status, sexual orientation, or biological relationship to the child. Like the marital couple in *Johnson,* two same-sex parents can both be considered the legal parents based on their use of reproductive technologies to cause the birth of a child.

FAMILY CODE SECTION 7613(a)

Family Code section 7613(a) provides that a man who consents to his wife's insemination is the child's legal parent, even if he is not biologically related to the resulting child.[201] The statutory language in section 7613(a) refers only to married, different-sex couples. But under Family Code section 297.5(d), section 7613(a) applies to domestic partners effective January 1, 2005.[202]

In *Buzzanca,* the court construed Family Code section 7613(a) liberally to establish legal parentage in a husband and wife who consented to the insemination of another woman—a gestational surrogate. Both section 7613(a) and *Buzzanca* are grounded in the pre-UPA case of *Sorensen:* "One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible."[203]

As in the situation covered by section 7613(a), *Sorensen* involved a married man who consented to the artificial insemination of his wife. To support the extension of the holding in *Sorensen* to unmarried persons, *Elisa B.* specifically cites that decision: "We observed that the 'intent of the Legislature obviously was to include every child, legitimate or illegitimate, born or unborn, and enforce the obligation of support against the person who could be determined to be the lawful parent.'"[204]

In determining that the presumption of Family Code section 7611(d) should not be rebutted based on evidence of Elisa's procreative conduct that caused the birth of the children, the court in *Elisa B.* quoted the reasoning of *Sorensen,* which is essentially the same as the

court's analysis of Family Code section 7613(a) in *Buzzanca:* "[A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood…. [I]t is safe to assume that without defendant's active participation and consent the child would not have been procreated."[205]

Likewise, the court concluded that Elisa B. "actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother…."[206] Similar to the analysis of *Elisa B.,* the *K.M.* court looked to the parties' procreative conduct to find that K.M. was not a donor under Family Code section 7613(b), finding instead that K.M. and E.G. "both intended to bring the child into their joint home."[207]

Although Family Code section 7613(a) does not specifically address the parental rights of a woman who consents to the insemination of another woman, the court in *Buzzanca* concluded that section 7613(a) applied to the wife because of her "acts which *caused the birth* of a child."[208] As noted by the court in *Elisa B.,* with respect to section 7613(a), *Buzzanca* holds that both husband and wife are equally situated.[209] According to *Buzzanca*'s statutory construction of section 7613(a) and a gender-neutral application of the UPA, as articulated by *Elisa B.,* it necessarily follows that section 7613(a) should apply to a woman who consents to the artificial insemination of her lesbian partner in the context of a committed relationship.

While *Elisa B.* did not establish legal parentage under Family Code section 7613(a), the court did cite to *Buzzanca* to support its determination that the UPA applied equally to men and women. *Elisa B.* summarized *Buzzanca* as follows: "[T]he declaration in section 7613 that a husband who consents to artificial insemination is 'treated in law' as the father of the child applies equally to the wife if a surrogate, rather than the wife, is artificially inseminated, making both the wife and the husband the parents of the child so produced."[210] Further, *Elisa B.* observed that the UPA was enacted to protect every child's relationship with his or her parents, regardless of the parents' marital status.[211] Indeed, the Legislature has declared that the parent-child relationship extends to every parent and child regardless of the parents' marital status.[212] *Elisa B.* also cites to *Dunkin v. Boskey,* a more recent appellate court case, which suggests that, if the issue had been presented, the court would have found that an *unmarried* man was the legal parent of a child born to his female partner based on his consent to her insemination and voluntary consequent assumption of parenting duties.[213]

Based on the reasoning of these decisions, *Elisa B., K.M.,* and *Kristine H.* provide authority for unmarried heterosexual parents or same-sex parents, who do not qualify for the protections of Family Code section 297.5(d), to establish legal parentage under section 7613(a) in future cases. In sum, section 7613(a) should be construed to hold that two people may establish parentage regardless of gender, sexual orientation, or marital status. Any other result would undermine the core purpose of the UPA and violate the most basic precepts of equal protection, which were unequivocally affirmed by the California Supreme Court in all three decisions.

CONCLUSION

The three recent California Supreme Court decisions have forever changed the legal landscape for same-sex parents and unmarried heterosexual parents and their children. Couples who are not registered domestic partners will continue to have children through artificial insemination, just as many unmarried heterosexual couples do.[214] These children will continue to exist, and their parentage must be resolved.[215] As noted by the court in *Buzzanca,* regardless of one's opinions regarding the creation of children and alternative families through reproductive technologies, "courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored."[216]

Elisa B., K.M., and *Kristine H.* uphold the proposition from *Johnson* that the UPA "applies to any parentage determination."[217] To treat the children born into families with same-sex parents equally, the California

Supreme Court has properly applied the express policies and fulfilled the fundamental purpose for which the UPA was enacted: to erode the stigma and prejudice by treating all children as "legitimate." And in these cases, that treatment has extended to legitimizing the same-sex parents of those children as well.

NOTES

1. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

2. K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

3. Kristine H. v. Lisa R., 113 P.3d 690 (Cal. 2005).

4. Citing the three California Supreme Court decisions, the Washington State Supreme Court, on November 3, 2005, determined that a lesbian partner of the birth mother could establish legal parentage based on a showing that she was a de facto parent. *See In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005).

5. Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction,* 5 UCLA Women's L.J. 329, 379–80 (1995).

6. Cal. Fam. Code §§ 7600–7730 (West 2005).

7. People v. Sorensen, 437 P.2d 495 (Cal. 1968).

8. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

9. *See* Harry G. Krause, Illegitimacy: Law and Social Policy 25–28 (Bobbs-Merrill 1971).

10. *See* Homer H. Clark, The Law of Domestic Relations in the United States 149–72 (Thomson-West 2d ed. 1988) (describing common-law rules and U.S. Supreme Court decisions on illegitimacy).

11. *See* Harry G. Krause et al., Family Law: Cases, Comments, and Questions 293 (Thomson-West 4th ed. 1998).

12. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972).

13. Stanley v. Illinois, 405 U.S. 645 (1972).

14. *Id.* at 658.

15. *See* Krause, *supra* note 9, at 64–74.

16. *See* Cal. Fam. Code §§ 7600–7730 (West 2005).

17. *See* Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993).

18. *Id.* at 794 (Kennard, J., dissenting).

19. Krause, *supra* note 9, at 10–15; *see also* Cal. Fam. Code §§ 7601, 7602.

20. Cal. Fam. Code § 7601.

21. *Johnson,* 851 P.2d at 779.

22. *See* Cal. Fam. Code §§ 7601, 7610(a), 7650.

23. *See* Cal. Fam. Code §§ 7540, 7551, 7570, 7610, 7613.

24. *See* Cal. Fam. Code § 7613(a).

25. Cal. Fam. Code §§ 7570–7577.

26. Cal. Fam. Code §§ 7571, 7576.

27. *See generally* Krause, *supra* note 9.

28. *Id.* at 82.

29. *See generally* Krause, *supra* note 9.

30. *Id.*

31. *See, e.g.,* Cal. Fam. Code §§ 7540, 7611(a)–(c).

32. *Id.*

33. *See* Cal. Fam. Code §§ 7550–7558, 7635.5.

34. *See* Cal. Fam. Code §§ 7570–7577, 7644.

35. *See* Cal. Fam. Code § 7611(d).

36. *See* Cal. Fam. Code § 7541(b).

37. *See* Cal. Fam. Code §§ 7541, 7551; *see also* Miller v. Miller, 74 Cal. Rptr. 2d 797, 801 (Cal. Ct. App. 1998).

38. Cal. Fam. Code §§ 7570, 7601.

39. *See, e.g., In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 286–87 (Cal. Ct. App. 1998) (discussing a long line of cases assigning parental responsibility for support based on consent to artificial insemination rather than on biology).

40. *Id.;* County of Shasta v. Caruthers, 33 Cal. Rptr. 2d 18, 25 (Cal. Ct. App. 1995) ("California assigns to both the father and the mother of any child an equal and continuing responsibility to support their child").

41. *See* Cal. Fam. Code § 4053(a), (e).

42. *See* Cal. Fam. Code § 4053(f).

43. *See* Cal. Fam. Code § 4053(a).

44. *See* Cal. Fam. Code § 4055.

45. *In re* Marriage of Denise and Kevin C., 67 Cal. Rptr. 2d 508, 512 (Cal. Ct. App. 1997).

46. *In re* Marriage of Goodarzirad, 230 Cal. Rptr. 203, 208 (Cal. Ct. App. 1986).

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47. Cal. Fam. Code § 7614.

48. *See* Sharon S. v. Superior Court, 73 P.3d 554, 571 (Cal. 2003).

49. Troxel v. Granville, 530 U.S. 57 (2000).

50. *Id.* at 63.

51. Michael H. v. Gerald D., 491 U.S. 110 (1989).

52. *Id.* at 123.

53. *See, e.g., In re* Nicholas H., 46 P.3d 932 (Cal. 2002); *In re* Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002); *In re* Salvador M., 4 Cal. Rptr. 3d 705 (Cal. Ct. App. 2003).

54. *Id.*

55. *See In re* Jesusa V., 85 P.3d 2, 14–15 (Cal. 2004); *Nicholas H.,* 46 P.3d at 937–38; *Salvador M.,* 4 Cal. Rptr. 3d at 708.

56. *See Nicholas H.,* 46 P.3d at 938.

57. That section presumes a man to be a child's natural father if "[h]e receives the child into his home and openly holds out the child as his natural child." Cal. Fam. Code § 7611(d).

58. *See Nicholas H.,* 46 P.3d at 935.

59. *Id.*

60. *Salvador M.,* 4 Cal. Rptr. 3d at 709.

61. *Salvador M.,* 4 Cal. Rptr. 3d at 708; *see also Jesusa V.,* 85 P.3d at 216 ("biological paternity by a competing presumed father does not necessarily defeat a non-biological father's presumption of paternity"); *Nicholas H.,* 46 P.3d at 937 (presumed parents have no burden to present evidence establishing a biological link to the child); Steven W. v. Matthew S., 39 Cal. Rptr. 2d 535, 539 (Cal. Ct. App. 1995) (familial relationship "is considerably more palpable than the biological relationship of actual paternity.")

62. *Salvador M.,* 4 Cal. Rptr. 3d at 708.

63. Janet L. Dolgin, Defining the Family: Law, Technology, and Reproduction in an Uneasy Age 34 (N.Y. Univ. Press 1997).

64. *See* Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law,* 23 Vt. L. Rev. 225, 236, 245 n.135 (1998).

65. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

66. *Id.* at 777–78.

67. *Id.* at 778.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 779.

72. *Id.*

73. *Id.*

74. *Id.* at 781.

75. *Id.* (The case refers to Civil Code section 7003, which became Family Code section 7610 when the Family Code became operative in 1994.)

76. *Id.*

77. *Id.* at 781 n.8, 782 n.9.

78. *Id.* at 781 n.8.

79. *Id.* at 782.

80. *Id.*

81. *Id.*

82. *Id.* at 786.

83. *Id.* at 786–87.

84. *Id.* at 781 n.8.

85. *See, e.g.,* Cal. Fam. Code §§ 7540, 7611, 7613(a) (West 2005).

86. See Michael H. v. Gerald D., 491 U.S. 110 (1989); Dawn D. v. Superior Court, 952 P.2d 1139 (Cal. 1998).

87. *Michael H.,* 491 U.S. at 111.

88. *Johnson,* 851 P.2d at 796 (Kennard, J., dissenting).

89. *Id.* at 782–83.

90. *Id.* at 783 (citation omitted).

91. Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood,* 33 Conn. L. Rev. 127, 130 (2000).

92. Adoption of Matthew B., 284 Cal. Rptr. 18 (Cal. Ct. App. 1991).

93. *Id.* at 21.

94. *Id.* at 25.

95. *Id.* (citations omitted).

96. *Johnson,* 851 P.2d at 783 (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood:*

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An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 309).

97. *Johnson,* 851 P.2d at 783 (citation omitted).

98. *Id.* (citation omitted).

99. Burchard v. Garay, 724 P.2d 486, 491 n.6 (Cal. 1986).

100. Cal. Fam. Code § 3020(a) (West 2005).

101. *Johnson,* 851 P.2d at 779.

102. *Id.* at 780.

103. Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World,* 20 J. Juv. L. 1, 17–18 (1999).

104. *Johnson,* 851 P.2d at 783; *see also In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

105. *See* Cal. Fam. Code § 7601.

106. *See Johnson,* 851 P.2d 776; Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003); *Buzzanca,* 72 Cal. Rptr. 2d 280; *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994); Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

107. *See Jhordan C.,* 224 Cal. Rptr. 530; *Johnson,* 851 P.2d 776; *Robert B.,* 135 Cal. Rptr. 2d 785.

108. *See Buzzanca,* 72 Cal. Rptr. 2d 280; *Robert B.,* 135 Cal. Rptr. 2d 785; *Moschetta,* 30 Cal. Rptr. 2d 893.

109. *Moschetta,* 30 Cal. Rptr. 2d 893.

110. *Id.* at 900.

111. *Id.*

112. *Id.*

113. *Id.* at 901.

114. *Id.* at 900.

115. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

116. *Id.*

117. *Id.* at 288 (emphasis added).

118. People v. Sorensen, 437 P.2d 495 (Cal. 1968).

119. *Id.* at 499.

120. *Id.*

121. *Buzzanca,* 72 Cal. Rptr. 2d at 284.

122. *Id.* at 282.

123. Cal. Fam. Code § 297.5(d) (West 2005).

124. *See also* Sharon S. v. Superior Court, 73 P.3d 554, 572 n.23 (Cal. 2003).

125. Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993).

126. *Id.*

127. *Id.* at 784.

128. *Id.* at 779.

129. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

130. *Id.* at 663.

131. *Id.*

132. *Id.*

133. *Id.* at 663–64.

134. *Id.* at 662–63.

135. *Id.* at 666.

136. *Id.*

137. *Id.* (citations omitted).

138. *See* West v. Superior Court, 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997); Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991); Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990).

139. *See, e.g., West,* 69 Cal. Rptr. 2d at 164 ("If the Legislature does not provide a person with standing to obtain parental rights, the courts must presume the Legislature is acting, or refusing to act, by virtue of its position as representatives of the will of the people").

140. *Nancy S.,* 279 Cal. Rptr. 212.

141. *Id.* at 219.

142. *Id.*

143. Elisa B. v. Superior Court, 117 P.3d 660, 671–72 (Cal. 2005).

144. *Id.* at 664.

145. *Id.*

146. *Id.* at 667.

147. *Id.* at 666–67.

148. *See In re* Nicholas H., 46 P.3d 932 (Cal. 2002); *In re* Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002).

149. *Nicholas H.,* 46 P.3d at 938.

150. *Id.*

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151. *See also Karen C.,* 124 Cal. Rptr. 2d 677; *Nicholas H.,* 46 P.3d 932; *In re* Jesusa V., 85 P.3d 2 (Cal. 2004); Steven W. v. Matthew S., 39 Cal. Rptr. 2d 535, (Cal. Ct. App. 1995); *In re* Salvador M., 4 Cal. Rptr. 3d 705 (Cal. Ct. App. 2003); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

152. *Elisa B.,* 117 P.3d at 669.

153. *Id.*

154. *Id.* at 668.

155. *Id.* at 669.

156. *Id.* at 670 (quoting amicus curiae the California State Association of Counties).

157. *Id.*

158. K.M. v. E.G., 117 P.3d 673, 675–77 (Cal. 2005).

159. *Id.* at 677.

160. *Id.* at 675.

161. *Id.* at 676.

162. *Id.* at 677.

163. *Id.* at 678.

164. *Id.* at 680–81.

165. *Id.* at 679.

166. *Id.* (citations omitted).

167. *Id.* at 682.

168. *See, e.g., In re* Marriage of Goodarzirad, 230 Cal. Rptr. 203 (Cal. Ct. App. 1986). In *Goodarzirad,* the biological father signed a stipulation in court whereby he waived "any and all rights to the care, custody and control of the minor child" in exchange for a waiver of all past-due and future child support. The court held that the stipulation was invalid as an unlawful abridgment of the court's inherent power to oversee contracts involving children to ensure that the children's welfare is protected. *Id.* at 206–09.

169. *See, e.g., In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Cal. Ct. App. 1998). In *Buzzanca,* Mr. Buzzanca asserted that he would "offer testimony to the effect that [his wife] told him that she would assume all responsibility for the care of any child born" and that she had promised not to hold him responsible for the child. In rejecting Mr. Buzzanca's claim that he should not be held to be a legal parent based on this understanding, the appellate court explained, "[I]t could make no difference as to [Mr. Buzzanca's] lawful paternity." *Id.*

170. *Id.*

171. *See* Cal. Fam. Code § 7613(b) (West 2005).

172. *In re* R.C., 775 P.2d 27 (Colo. 1989).

173. K.M. v. E.G., 117 P.3d 673, 680 (Cal. 2005).

174. *See* Adoption of Matthew B., 284 Cal. Rptr. 18 (Cal. Ct. App. 1991); *see also* Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003).

175. *See, e.g., Robert B.,* 135 Cal. Rptr. 2d 785; *Matthew B.,* 284 Cal. Rptr. 18; Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

176. *Robert B.,* 135 Cal. Rptr. 2d at 785–86.

177. *Id.* at 787 (citations omitted).

178. *Jhordan C.,* 224 Cal. Rptr. at 531. (The case refers to Civil Code section 7005, which became Family Code section 7613 when the Family Code became operative in 1994.)

179. *Id.* at 532.

180. *Id.*

181. *Id.* at 534.

182. *Id.* at 532, 535.

183. K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005).

184. *See, e.g., Jhordan C.,* 224 Cal. Rptr. at 536.

185. *K.M.,* 117 P.3d at 680.

186. *Id.* at 681.

187. *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Cal. Ct. App. 1994).

188. Kristine H. v. Lisa R., 113 P.3d 690, 691 (Cal. 2005).

189. *Id.*

190. *Id.* at 692.

191. *Id.*

192. *Id.*

193. *Id.* at 693.

194. *Id.* at 696.

195. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

196. *Johnson,* 851 P.2d at 782; K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005); Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005); *Kristine H.,* 113 P.3d at 691.

197. *K.M.,* 117 P.3d at 679.

198. *Id.*

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199. *Elisa B.,* 117 P.3d at 670.

200. *Johnson,* 851 P.2d at 781.

201. Cal. Fam. Code § 7613(a) (West 2005).

202. Cal. Fam. Code § 297.5(d).

203. People v. Sorensen, 437 P.2d 495, 499 (Cal. 1968).

204. *Elisa B.,* 117 P.3d at 670 (citation omitted).

205. *Id.* (citation omitted).

206. *Id.*

207. K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005).

208. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 289 (Cal. Ct. App. 1998).

209. *Elisa B.,* 117 P.3d at 667 (citation omitted).

210. *Id.*

211. *Id.* at 664.

212. Cal. Fam. Code § 7602 (West 2005).

213. Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 55 (2000).

214. *See id.* (litigation regarding child born through assisted reproduction to an unmarried heterosexual couple); *see also In re* Parentage of M.J., 787 N.E.2d 144 (Ill. 2003).

215. *See, e.g., In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998).

216. *Id.*

217. Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993).